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Foley Atty In High Court Row May Have Broken Ethics Rules

By **Andrew Strickler**

Law360, New York (February 23, 2015, 8:27 PM ET) -- The Foley & Lardner LLP partner who drew a rare sanction threat from the U.S. Supreme Court for filing an impenetrable, jargon-packed petition he says was penned largely by his client may have breached professional conduct rules when he didn't withdraw from the patent case, legal ethics experts said.

Following a December order from the high court to show why he shouldn't face a sanction related to an indecipherable certiorari petition, counsel for Foley partner Howard Shipley said he was faced with "competing demands" of professional obligations and a controlling client who insisted on filing an "unorthodox" petition.

While voicing sympathy for Shipley's apparent predicament, ethics experts said Shipley's argument that his client was primarily responsible for the tangled prose didn't speak to professional conduct rules governing obligations to withdraw when faced with "a fundamental disagreement."

"The filing has the attorney's signature on it and endorses that it's a meritorious argument," said Seth Laver of Goldberg Segalla LLP. "If the attorney can't stand behind that, they're obligated to withdraw."

In December, the U.S. Supreme Court made the rare move of threatening Shipley with sanction for his conduct stemming from a petition filed on behalf of Sigram Schindler Beteiligungsgesellschaft MBH.

Shipley, now represented by Paul Clement and Jeffrey Harris of Bancroft PLLC, said in his Friday response that the content of the document was largely the work of Dr. Sigram Schindler.

Schindler, a Polish-born inventor who holds 14 telecommunications technology and Internet patents, has a long-standing interest in patent law and developed theories about patent interpretation and "technology designed to embody those theories," the response says.

The 37-page petition — 190 pages with appendices, images and other documents — purporting to challenge a Federal Circuit ruling from April, asks the court to "unmistakably clarify" issues related to claims construction and three decisions.

The petition is replete with acronyms, midparagraph bullet points, unconventional punctuation and mathematical notation. The first footnote states that the petition uses "terminology introduced by SSBG's preceding petition, e.g. 'classical technology/emerging technology claimed invention.'"

Mark Painter, a former Ohio appeals court judge, called the petition "gibberish" and professionally unjustifiable.

"It's just terrible, and for anyone to sign it, I just don't see how you can justify it, even if he says, 'The client made me do it,'" said Painter, who is now of counsel at Manley Burke LPA.

"Whether it will be a sanctionable offense for the Supreme Court, I don't know, but it's unprofessional at the

very least," he said. "I've seen some bad ones, but not this bad. Most are at least in complete sentences."

The court in December rejected Schindler's petition, saying the patent in question was obvious, without further comment.

U.S. Supreme Court bar rules give the court wide latitude to disbar or suspend a lawyer who has "engaged in conduct unbecoming a member of the bar of this court" after giving the member a chance to show why an order shouldn't be entered.

The American Bar Association Model Rules of Professional Conduct also outline a lawyer's obligation to abide by a client's decisions on the objectives of representation and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Model Rule 1.16 states that lawyers are obligated to withdraw if a client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

Laver, who specializes in professional liability matters, said a "client made me do it" defense doesn't release lawyers from their obligation to withdraw from a case when they have a fundamental disagreement about the matter.

"If counsel can say, 'We believe it had some chance of success, even if we disagreed entirely with the format; we stand by the goal,' then I'm not aware of a breach of the model rules," Laver said. "If counsel now says, 'I didn't want to file this document or pursue this at all, and the client insisted, so we did it,' then that's a major problem."

Attorney sanctions initiated by the high court are exceedingly rare, Clement wrote in his response, and typically come as reciprocal actions related to state bar actions.

From the outset of this engagement, he said, Schindler "insisted" that briefs include entire passages of his prose and his "precise language," despite pushback from his Foley lawyers. After the Federal Circuit denied a review, Schindler began preparing his cert petition and "retained complete control," with Shipley editing drafts, reviewing case law, and advising on filing requirements and court rules.

Schindler, frustrated with losing at the Federal Circuit, "felt this court would be uniquely receptive to his arguments if, but only if, he could convey them in his preferred manner."

Clement argues that a sanction order would in essence act as a rule of mandatory withdrawal for any lawyer facing the rare circumstances of a controlling client who was intent on making an argument that included his "favored locutions," but who may have been prejudiced before the court by his lawyer's withdrawal.

"This court should be extremely hesitant to adopt a rule of ethics or practice that would make lawyers skittish about representing clients who insist upon somewhat unconventional courses of action," the response said. "Difficult clients are the ones that are often most in need of advice and guidance of experienced counsel, and many of them may ultimately be persuaded to file more conventional pleadings."

Matthew S. Marrone, co-chair of Goldberg Segalla's professional liability practices focused on lawyers and insurance professionals, said implications in the response that Shipley could have been hit with a malpractice case at a later date if he had withdrawn were on point.

Under these circumstances, Marrone said, the ethics rule regarding withdrawing and Shipley's obligations not to file warrantless claims under Federal Rule 11 should be decided in Shipley's favor.

"It's a close call, but if all the lawyer is trying to do is serve his client, why should he be sanctioned for that?" he said. "It would just make lawyers second-guess more than they already do what they can and can't do in the course of representing a client."

A message left for Clement on Monday was not returned. A Foley spokesperson also did not respond to a request for comment.

Shipley is represented by Paul Clement and Jeffrey Harris of Bancroft PLLC.

The suit is In the Matter of Discipline of Howard Neil Shipley, case number 14B2827, in the Supreme Court of the United States.

--Editing by Kat Laskowski and Mark Lebetkin.